

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Chapter 7 Case

Michael R. Russell and Kimberly A.  
Russell,

Bky No. 02-41020

Debtors.

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Terri A. Georgen, Trustee,

Adv. No. 04-4105

Plaintiff,

v.

**RESPONSE TO PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

Kimberly A. Russell,

Defendant.

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TO: Plaintiff, TERRI A. GEORGEN, Trustee, and her attorney RANDALL L. SEAVER,  
ESQ., Fuller, Seaver & Ramette, P.A., 12400 Portland Avenue South, Suite 132,  
Burnsville, Minnesota 55337-2572:

1. Defendant Kimberly A. Russell submits this Response opposing the  
Plaintiff Terri A. Georgen, Trustee's Motion for Summary Judgment, and states as  
follows:

2. As is more fully described in the accompanying Memorandum of Law,  
because Minn. Stat. § 549.31 restricts the transfer of structured settlement payments,  
the structured settlement payment rights that the trustee seeks to recover is not  
property of the bankruptcy estate. Accordingly, Plaintiff's claim fails as a matter of law,  
and summary judgment should be entered against Plaintiff and in favor of Defendant.

3. As is more fully described in the accompanying Memorandum of Law,  
because any transfer of the structured settlement payment rights must comply with

Minn. Stat. § 549.31, and because a creditor could never establish the requirement of Minn. Stat. § 549.31, the structured settlement payment rights are not available to creditors and Plaintiff's 11 U.S.C, § 544 claim fails as a matter of law and judgment should be entered against Plaintiff and in favor of Defendant.

WHEREFORE, Defendant requests that the Court deny Plaintiff's Motion in its entirety and grant judgment against Plaintiff and in favor of Defendant.

Dated: October 21, 2004

MOSS & BARNETT, P.A.

By: /e/ Lorie A. Klein

Lorie A. Klein (#311790)  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 347-0363

**Attorneys for Defendant Kimberly A. Russell**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Chapter 7 Case

Michael R. Russell and Kimberly A.  
Russell,

Bky No. 02-41020

Debtors.

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Terri A. Georgen, Trustee,

Adv. No. 04-4105

Plaintiff,

v.

Kimberly A. Russell,

**MEMORANDUM OF LAW OPPOSING  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND SUPPORTING  
SUMMARY JUDGMENT IN FAVOR OF  
DEFENDANT**

Defendant.

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**INTRODUCTION**

Defendant Kimberly A. Russell submits this memorandum opposing the Plaintiff Terri A. Georgen, Trustee's Motion for Summary Judgment. Because Minn. Stat. § 549.31 restricts the transfer of structured settlement payments, the interest that Defendant holds in the structured settlement payments rights is not property of the bankruptcy estate. Moreover, because any transfer of the structured settlement payment rights must comply with Minn. Stat. § 549.31, and because a creditor could never establish the requirement of Minn. Stat. § 549.31, the structured settlement payment rights are not available to creditors and Plaintiff's 11 U.C.S § 544 claim fails as a matter of law. Because Plaintiff's claim fails as a matter of law, the Court should deny the Plaintiff's motion for summary judgment and enter judgment against Plaintiff and in favor of Defendant.

### **UNDISPUTED FACTS**

The facts are not disputed. In 1994, Defendant entered into a settlement for a personal injury action whereby American Family Mutual Insurance Company (“American Family”), as insurer of Allen H. Sullivan, agreed to pay certain monies to Defendant. Seaver Aff., Ex A.<sup>1</sup> The settlement provided that Defendant would receive a \$65,000 payment made at the time of settlement and that Defendant would receive payments of \$5,000 at age 25; \$15,000 at age 30; and \$71,738.86 at age 35. *Id.* American Family agreed that it would purchase an annuity contract from American Family Life to pay for the future payments. *Id.* Pursuant to the terms of the settlement, an annuity was purchased on behalf of the Defendant (the “Annuity”). Seaver Aff., Ex. B. The Annuity was issued on September 14, 1994, and per the terms of the settlement agreement, provided for lump sum payments of \$5,000 on October 23, 2000; \$15,000 on October 23, 2005; and \$71,738.86 on October 23, 2010. *Id.*

On March 19, 2002, Michael R. Russell and Kimberly A. Russell (“Debtors”) filed a Chapter 13 bankruptcy case. Docket, Case No. 02-41020. Defendant listed a “structured settlement, personal injury action, payable \$15,000 in 2004 and \$71,739.00 in 2012” as property owned (“Structured Settlement”). Seaver Aff. Ex. C. Defendant listed the Structured Settlement as exempt pursuant to Minn. Stat. § 550.37(22) on her Schedule C. Seaver Aff. Ex. C. The Chapter 13 Trustee objected to the claim Structured Settlement exemption. Seaver Aff. Ex. D. Before the hearing, Debtors converted the case to one under Chapter 7. On the Schedule B filed in conjunction with the conversion to Chapter 7, the Defendant claimed federal rather than state

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<sup>1</sup> The Affidavit of Randall Seaver accompanies Plaintiff’s Motion for Summary Judgment.

exemptions and listed the Structured Settlement as property and asserted that it was not property of the estate.<sup>2</sup> Seaver Aff., Ex. E.

The Plaintiff commenced this action asking the Court to find the Annuity is property of the bankruptcy estate and seeking turnover of the Annuity to Plaintiff. By Amended Complaint, Plaintiff asks the Court to find that the right to payments under the Annuity, in addition to the Annuity, are property of the bankruptcy estate and also asserts a claim pursuant to 11 U.S.C. § 544.

## **ARGUMENT**

### **I. SUMMARY JUDGMENT STANDARD.**

Pursuant to Fed. R. Civ. P. 56, which is incorporated into bankruptcy practice through Fed. R. Bankr. P. 7056, a court shall grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” On a motion for summary judgment, the moving party must demonstrate that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). When the moving party makes such a showing, the burden then falls on the non-moving party to establish the existence of a genuine issue of material fact. *Id.* at 324, 106 S. Ct. at 2553. If the non-moving party fails to meet its burden, then Rule 56 mandates entry in favor of the moving party. *Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552-2553. On a motion for summary judgment, courts should view all inferences and

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<sup>2</sup> Pursuant to 11 U.S.C. § 522(d)(11)(D), Defendant could exempt settlement payments up to the statutory amount, \$17,425 .

evidence in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505 (1986).

When considering the movant's motion for summary judgment, a court may grant summary judgment against the moving party and in favor of the non-moving party when the non-moving party is entitled to judgment as a matter of law. See, e.g., *Burlington Northern Railroad Company v. Omaha Public Power District*, 888 F.2d 1228, 1231 n. 3 (affirming district court's grant of summary judgment against the moving party where the court decided that as a matter of law the movant was not entitled to judgment and that judgment should be entered against it); 6 *Moore's Federal Practice* ¶ 56.12 (2d ed. 1988).

**II. THE ANNUITY IS NOT PROPERTY OF THE BANKRUPTCY ESTATE BECAUSE MINN. STAT. § 549.31 PROHIBITS TRANSFER OF THE ANNUITY UNLESS THE STATUTORY REQUIREMENT ARE MET. PLAINTIFF HAS NOT MET THOSE REQUIREMENTS.**

**A. Minn. Stat. § 549.31 restricts the transfers of structured settlement payment rights and structured settlement annuities.**

Minn. Stat. § 549.31 imposes restrictions on the transfers of structured settlement payment rights and structured settlement agreements. Minn. Stat. § 549.31 (2004); see also *Settlement Capital Corp. v. State Farm Mutual Auto. Ins. Co.*, 646 N.W.2d 550 (Minn. Ct. App. 2002). Minn. Stat. § 549.31, Subd. 1, provides, in pertinent part:

Subdivision 1. Generally. No direct or indirect transfer of structured settlement payment rights is effective and no structured settlement obligor or annuity issuer is required to make a payment directly or indirectly to a transferee of structured settlement payment rights unless the transfer has been authorized in advance in a final order of a court of competent jurisdiction or responsible administrative authority, based on the court's or responsible administrative authority's written express findings that:

(a) the transfer complies with the requirements of sections 549.31 to 549.34 and will not contravene other applicable law;

(b) not less than ten days before the date on which the payee first incurred an obligation with respect to the transfer, the transferee has provided to the payee a disclosure statement in bold type, no smaller than 14 points, specifying:

(1) the amounts and due dates of the structured settlement payments to be transferred;

(2) the aggregate amount of the payments;

(3) the discounted present value of the payments, together with the discount rate used in determining the discounted present value;

(4) the gross amount payable to the payee in exchange for the payments;

(5) an itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, notary fees, and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

(6) the net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described in clause (5);

(7) the quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments; and

(8) the amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

(c) the payee has established that the transfer is in the best interests of the payee and the payee's dependents;

(d) the payee has received independent professional advice regarding the legal, tax, and financial implications of the transfer;

(e) the transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court or responsible administrative authority; and

(f) that the transfer agreement provides that any disputes between the parties will be governed, interpreted, construed, and enforced in accordance with the laws of this state and that the domicile state of the payee is the proper place of venue to bring any cause of action arising out of a breach of the agreement. The transfer agreement must also provide

that the parties agree to the jurisdiction of any court of competent jurisdiction located in this state.

If the transfer would contravene the terms of the structured settlement, upon the filing of a written objection by any interested party and after considering the objection and any response to it, the court or responsible administrative authority may grant, deny, or impose conditions upon the proposed transfer as the court or responsible administrative authority deems just and proper under the facts and circumstances in accordance with established principles of law. Any order approving a transfer must require that the transferee indemnify the annuity issuer and the structured settlement obligor for any liability including reasonable costs and attorney's fees arising from compliance by the issuer or obligor with the order of the court or responsible administrative authority.

Minn. Stat. § 549.31, Subd. 1. (Emphasis added).

**B. Minn. Stat. § 549.31 Applies In This Case And Results In the Defendant's Structured Settlement Being Excluded From The Bankruptcy Estate.**

First, the Plaintiff incorrectly asserts that Minn. Stat. § 549.31 applies only when the underlying structured settlement agreement was entered into after August 1, 1999. Pub. Law. 1999, c.212, § 7 provides that Minn. Stat. § 549.31 “applies to structured settlement agreements entered into on or after August 1, 1999, and the transfer of structured settlement payment rights under a transfer agreement entered into on or after August 1, 1999. (Emphasis added). The plain reading of this phrase, when considered in light of the remedial consumer-protection purpose of the statute, results in only one reasonable interpretation: that the statute applies where either situation is present. The Minnesota Court of Appeals applied Minn. Stat. § 549.31 in a case where the parties entered into the transfer agreement after August 1, 1999 but where the structured settlement agreement resolving the claim was entered into in 1988, over ten years before the statute was enacted. *Settlement Capital Corp.*, 646 N.W.2d at 552-53. Like the circumstances in *Settlement Capital Corp.*, because the Plaintiff proposes to



transfer the settlement payments after August 1, 1999, Minn. Stat. § 549.31 applies to this case.

Second, Defendant would receive consideration from the transfer sufficient to satisfy the definition of transfer in Minn. Stat. § 549.30, subd. 17.<sup>3</sup> “Consideration is often defined as ‘something which is of some value in the eye of the law . . . .’” *Johnson v. Kruse*, 205 Minn. 237, 241, 285 N.W. 715, 717 (Minn. 1939), *overruled on other grounds by Bennett v. Johnson*, 230 Minn. 404, 42 N.W.2d 44 (Minn. Mar 24, 1950); see also *Blacks Law Dictionary*, 6<sup>th</sup> ed. (defining consideration as “[s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.”). Defendant receives something of value when her creditors are paid. Payment of Defendant’s debts, even debts listed in her bankruptcy, benefit Defendant in a manner that is recognized by law, including reducing the moral obligation to pay the debt. *Mutual Reserve Fund Life Ass’n v. Beatty*, 93 F. 747, 756 (9<sup>th</sup> Cir. 1899) (“When a debt has been discharged by proceedings in insolvency or bankruptcy, the remedy to enforce the payment of the debt is gone; but the moral obligation to pay it still remains, and is a good consideration for a new promise to make such payment, and the new promise may be oral.”); *In re Merriman*, 17 F. Cas. 131, 132 (D.C. Conn. 1878) (“[T]he moral obligation to make payment, although the debt has been legally discharged, is a sufficient consideration for a new and express promise.”) In addition, creditors who receive payment will be more

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<sup>3</sup> Transfer is defined as “a sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration.” Minn. Stat. § 549.30, subd. 17. The phrase “made by a payee for consideration” follows “or other form of alienation or encumbrance made” and thus does not limit “sale, assignment, pledge, hypothecation.”

likely to extend credit to the Defendant in the future resulting in a financial benefit to the Defendant. Moreover, that the debtor must receive some benefit when a discharged debt is paid is evident by the existence and use of 11 U.S.C. § 524 to reaffirm pre-petition dischargeable debts. Because the payment of Defendant's debts constitutes consideration, sufficient consideration exists pursuant to Minn. Stat. § 549.30, subd. 17.

Third, the Plaintiff also mistakenly argues that the Structured Settlement is property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1). 11 U.S.C. § 541(a)(1) provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Johnson v. First Nat. Bank of Montevideo*, 719 F.2d 270, 276, n.8 (Bankr. D. Minn. 1983). "In characterizing the nature and extent of the debtor's interest in property, however, federal courts must look to state law." *Id.* Congress generally has left the "determination of property rights in the assets of the bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Here, Minnesota law results in structured settlement agreements and structured settlement payments being excluded from the bankruptcy estate.

In *Christians v. Dulas*, 95 F.3d 703 (8<sup>th</sup> Cir. 1996), the Eighth Circuit concluded that structured settlement payments resulting from a settlement of a personal injury action were not exempt under Minn. Stat. § 550.37, subd. 22, which exempted only the cause of action resulting from personal injury. Only three years later, in 1999, the Minnesota legislature enacted Minn. Stat. 549.31, which changes the nature of a payee's property interest in structured settlements and effectively insulates structured

settlement payment rights from the reach of a payee's creditors. The plain language of Minn. Stat. § 549.31 in pertinent part reads:

No direct or indirect transfer of structured settlement payment rights is effective and no structured settlement obligor or annuity issuer is required to make a payment directly or indirectly to a transferee of structured settlement payment rights unless the transfer has been authorized . . . in a final order of a court . . . based on the court's . . . written express findings that . . . c) the payee has established that the transfer is in the best interests of the payee and the payee's dependents.

Under this language an annuity issuer is not required to pay a structured settlement payment to someone other than the payee unless a court order with the required findings are made. Thus, even if Plaintiff is successful in obtaining judgment, American Family Life is not required to pay the payment proceeds to Plaintiff unless the court order with the required findings are made. Notably, the Plaintiff did not commence an action against American Family Life and has not given American Family Life notice of this action. Nor has Plaintiff provided this Court with sufficient evidence for this Court to make the required findings set forth in Minn. Stat. § 549.31. See Minn. Stat. § 549.31 (stating that the district court has nonexclusive jurisdiction over an application pursuant to Minn. Stat. § 549.31).

Moreover, if a creditor sought to obtain a payee's right to structured settlement payments, it would be required to seek a court order stating that the transfer is in the best interests of the payee and the payee's dependents.<sup>4</sup> It is difficult to see how any creditor could establish this showing. Similarly, a trustee can never establish the statutory requirements to obtain the required court order to allow transfer of the

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<sup>4</sup> Pursuant to Minn. Stat. § 549.30, the term transfer includes other form of alienation of encumbrance made by a payee for consideration.

payments, namely that the transfer is in the best interest of the payee and the payee's dependents. Accordingly, Minn. Stat. § 549.31 changes the nature of structured settlement payments in Minnesota and removes structured settlement agreement and structured settlement payments from the reach of creditors and from the bankruptcy estate.

**C. The Structured Settlement and Annuity are not property of the bankruptcy estate because the Annuity contains an anti-alienation clause enforceable against third parties pursuant to Minn. Stat. § 549.31 and is thus unavailable to creditors.**

11 U.S.C. § 541(c)(2) provides that “A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.” The Group Annuity Certificate (Seaver Aff. Ex B) provides that “To the extent allowed by law, annuity benefits will be free from the claims of all creditors.” Whether the structured settlement constitutes a spendthrift trust is an issue of state law. See, e.g., *Jacobs v. Shields*, 116 B.R. 134, 136 (Bankr. D. Minn. 1990) (stating whether pension fund qualified as a spendthrift trust was analyzed under the applicable state law). Accordingly, if the restriction on transfer of structured settlement agreements and payments is a spendthrift trust enforceable under nonbankruptcy law, it will be enforceable in bankruptcy court and the structured settlement agreements and payments will not be part of the bankruptcy estate.<sup>5</sup>

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<sup>5</sup> The Plaintiff claims that the structured settlement payments and Annuity is not a “trust” and therefore 11 U.S.C. § 541(c)(2) does not apply. However, state law determines what is a spendthrift trust, and various financial arrangements have been found to be a spendthrift trust. For example, an ERISA pension plan was considered a trust for purposes of 11 U.S.C. § 541(c)(1). See *In re Conlan*, 974 F.2d 88, 89 (8<sup>th</sup> Cir. 1992) (concluding that the terms “applicable nonbankruptcy law” encompasses any relevant nonbankruptcy law, including federal law such as ERISA.”

*In re Mack*, 269 B.R. 392 (Bankr. D. Minn. 2001) stated that federal courts have concluded that Minnesota state courts would not recognize a spendthrift trust if the trust was self settled. However, restrictions on transfers pursuant to Minn. Stat. § 549.31 and anti-assignment clauses contained in self settled structured settlement agreements and structured settlement payment rights are now valid and enforceable under Minnesota law.

In *Settlement Capital Corp.*, the structured settlement was self settled. *Settlement Capital Corp.*, 646 N.W.2d at 553-54. In *Settlement Capital Corp.*, the Minnesota Court of Appeals rejected the argument that Minn. Stat. § 549.31 only applies to structured settlements that contained an anti-assignment clause. Instead, the court found that Minn. Stat. § 549.31 applied to structured settlements that contain anti-assignment clauses as well as those that did not. By this finding, as applied to the self settled trust at issue in that case, the court implicitly acknowledged that *self settled* structured settlements that contain anti-assignment clause are valid under Minnesota law in light of Minn. Stat. § 549.31. This is the only reasonable conclusion, particularly in light of the purpose of Minn. Stat. § 549.31 as stated by the Court of Appeals, which is to protect injured persons who seek to transfer their rights to payment. Minn. Stat. § 549.31, by its terms, arguably creates a new statutory form of property interest for self settled structured settlements, one which is essentially a form of a spendthrift trust because transfer of the payee's interest is not permitted absent a court finding that the transfer would be in the payee and the payee's dependents best interest.

Given the plain language of Minn. Stat. § 549.31 and the Minnesota Court of Appeals interpretation of Minn. Stat. § 549.31 in *Settlement Capital Corp.*, the structured

settlement annuity payments are “a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.”

**III. PLAINTIFF’S 11 U.S.C. § 544 CLAIM FAILS BECAUSE IT WAS NOT COMMENCED WITHIN THE TIME LIMITS PROSCRIBED BY 11 U.S.C. § 546 AND THE STRUCTURED SETTLEMENT IS NOT PROPERTY OF THE BANKRUPTCY ESTATE IN LIGHT OF MINN. STAT. § 549.31.**

**A. Plaintiff Failed To Commence The 11 U.S.C. § 544 Claim Within The Time Limits Set Forth In 11 U.S.C. § 546.**

More than two years after the date the case was filed, Plaintiff moved to amended her complaint to add a new claim purportedly arising under 11 U.S.C. § 544. Service and filing of the Amended Complaint occurred more than two years after the bankruptcy case was commenced. Plaintiff’s 11 U.S.C. § 544 claim raises new issues not included within the original complaint. Because Plaintiff’s new claim was commenced after the two year statute of limitations set forth in Minn. Stat. § 546 expired, Plaintiff is not entitled to judgment on this count and judgment should be entered against Plaintiff.

**B. Pursuant To Minn. Stat. § 549.31 the Structured Settlement Is Not Reachable By Creditors.**

The Plaintiff seeks a determination pursuant to 11 U.S.C. § 544 that the estate has the rights of a judgment creditor against the Annuity and that those rights are superior to the Defendant’s interest. However, as discussed in detail above, any transfer of the structured settlement payment rights must comply with Minn. Stat. § 549.31 and therefore a creditor seeking to obtain a payee’s right to structured settlement payments would be required to seek a court order stating that the transfer is in the best interests of the payee and the payee's dependents. A creditor would not be

able to make this showing as a matter of law.<sup>6</sup> As a result, the Plaintiff's claim fails and judgment should be entered against Plaintiff and in favor of Defendant on this count.

### **CONCLUSION**

Because Minn. Stat. § 549.31 restricts the transfer of structured settlement payments, and because it is an enforceable spendthrift trust under Minnesota law, the property interest that a payee holds in structured settlement payments is not property of the bankruptcy estate. Plaintiff's 11 U.S.C. § 544 claim fails because it was not commenced within the time limits proscribed by 11 U.S.C. § 546 and the structured settlement is not property of the bankruptcy estate in light of Minn. Stat. § 549.31. Because Plaintiff's claims fail as a matter of law, the Court should deny the Plaintiff's motion for summary judgment and enter judgment against Plaintiff and in favor of Defendant.

Dated: October 21, 2004

MOSS & BARNETT, P.A.

By: /s/ Lorie A. Klein

Lorie A. Klein (#311790)  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 347-0363

**Attorneys for Defendant Kimberly A. Russell**

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<sup>6</sup> The Plaintiff argues that if the legislature intended to exempt personal injury structured settlement payments it would have enacted a statute similar to Minn. Stat. § 176.175, subd. 2. The Plaintiff misses the point. The legislature did in fact enact a statute restricting the transfer of structured settlement: Minn. Stat. § 549.31.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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Michael R. Russell and Kimberly A.  
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Terri A. Georgen, Trustee,

Adv. No. 04-4105

Plaintiff,

v.

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER FOR JUDGMENT**

Kimberly A. Russell,

Defendant.

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The above matter came before the court on October 28, 2004 on the motion of the Plaintiff for summary judgment. Based upon the filed, records, and proceedings here, and the court being fully advised in the premises, the court makes the following:

**FINDINGS OF FACT**

1. In 1994, Defendant entered into a settlement for a personal injury action whereby American Family Mutual Insurance Company ("American Family"), as insurer of Allen H. Sullivan, agreed to pay certain monies to Defendant.

2. The settlement provided that Defendant would receive a \$65,000 payment made at the time of settlement and that Defendant would receive payments of \$5,000 at age 25; \$15,000 at age 30; and \$71,738.86 at age 35.



3. American Family agreed that it would purchase an annuity contract from American Family Life to pay for the future payments.

4. Pursuant to the terms of the settlement, an annuity was purchased on behalf of the Defendant (the "Annuity").

5. The Annuity was issued on September 14, 1994, and per the terms of the settlement agreement, provided for lump sum payments of \$5,000 on October 23, 2000; \$15,000 on October 23, 2005; and \$71,738.86 on October 23, 2010.

6. On March 19, 2002, Michael R. Russell and Kimberly A. Russell ("Debtors") filed a Chapter 13 bankruptcy case. Docket, Case No. 02-41020. Defendant listed a "structured settlement, personal injury action, payable \$15,000 in 2004 and \$71,739.00 in 2012" as property owned ("Structured Settlement").

7. Defendant listed the Structured Settlement as exempt pursuant to Minn. Stat. § 550.37(22) on her Schedule C. Seaver Aff. Ex. C. The Chapter 13 Trustee objected to the claim Structured Settlement exemption. Seaver Aff. Ex. D. Before the hearing, Debtors converted the case to one under Chapter 7. On the Schedule B filed in conjunction with the conversion to Chapter 7, the Defendant listed the Structured Settlement as property and asserted that it was not property of the estate.

8. The Plaintiff commenced this action asking the Court to find the Annuity is property of the bankruptcy estate and seeking turnover of the Annuity to Plaintiff. By Amended Complaint, Plaintiff now asks the Court to find that the right to payments under the Annuity, in addition to the Annuity, are property of the bankruptcy estate and also asserts a claim pursuant to 11 U.S.C. § 544.

## **CONCLUSIONS OF LAW**

1. Minn. Stat. § 549.31 imposes restrictions on the transfers of structured settlement payment rights and structured settlement agreements. Minn. Stat. § 549.31 (2004); *see also Settlement Capital Corp. v. State Farm Mutual Auto. Ins. Co.*, 646 N.W.2d 550 (Minn. Ct. App. 2002). Minn. Stat. § 549.31, Subd. 1, provides, in pertinent part:

No direct or indirect transfer of structured settlement payment rights is effective and no structured settlement obligor or annuity issuer is required to make a payment directly or indirectly to a transferee of structured settlement payment rights unless the transfer has been authorized in advance in a final order of a court of competent jurisdiction or responsible administrative authority, based on the court's or responsible administrative authority's written express findings that:

. . .

(c) the payee has established that the transfer is in the best interests of the payee and the payee's dependents;

. . .

2. Minn. Stat. § 549.30-.34 applies to this case. Pub. Law. 1999, c.212, § 7 provides that Minn. Stat. § 549.31 “applies to structured settlement agreements entered into on or after August 1, 1999, and the transfer of structured settlement payment rights under a transfer agreement entered into on or after August 1, 1999. The plain reading of this phrase, when considered in light of the remedial consumer-protection purpose of the statute, results in only one reasonable interpretation: that the statute applies where either situation is present. The Minnesota Court of Appeals applied Minn. Stat. § 549.31 in a case where the parties entered into the transfer agreement after August 1, 1999 but where the structured settlement agreement resolving the claim was entered into in

1988, over ten years before the statute was enacted. *Settlement Capital Corp.*, 646 N.W.2d at 552-53.

3. Defendant would receive consideration when its debts are paid. Payment of Defendant's debts, even debts listed in her bankruptcy, benefit Defendant in a manner that is recognized by law, including reducing the moral obligation to pay the debt. *Mutual Reserve Fund Life Ass'n v. Beatty*, 93 F. 747, \*756 (9<sup>th</sup> Cir. 1899) ("When a debt has been discharged by proceedings in insolvency or bankruptcy, the remedy to enforce the payment of the debt is gone; but the moral obligation to pay it still remains, and is a good consideration for a new promise to make such payment, and the new promise may be oral."); *In re Merriman*, 17 F. Cas. 131, 132 (D.C. Conn. 1878) ("[T]he moral obligation to make payment, although the debt has been legally discharged, is a sufficient consideration for a new and express promise.") In addition, creditors who receive payment will be more likely to extend credit to the Defendant in the future resulting in a financial benefit to the Defendant. The transfer in order to pay creditors is sufficient to satisfy the definition of transfer in Minn. Stat. § 549.30, subd. 17.

4. The Annuity and the structured settlement payments are not property of the bankruptcy estate pursuant to 11 U.S.C. § 541. Congress generally has left the "determination of property rights in the assets of the bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). 11 U.S.C. § 541(a)(1) provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Johnson v. First Nat. Bank of Montevideo*, 719 F.2d 270, 276, n.8 (Bankr. D. Minn. 1983). "In

characterizing the nature and extent of the debtor's interest in property, however, federal courts must look to state law.” *Id.*

5. In *Christians v. Dulas*, 95 F.3d 703 (8<sup>th</sup> Cir. 1996), the Eighth Circuit concluded that structured settlement payments resulting from a settlement of a personal injury action were not exempt under Minn. Stat. § 550.37, subd. 22, which exempted only the cause of action resulting from personal injury. Three years later, in 1999, the Minnesota legislature enacted Minn. Stat. 549.31, which changes the nature of a payee’s property interest in structured settlements and effectively insulates structured settlement payment rights from the reach of a payee’s creditors.

6. Under Minn. Stat. § 549.31, an annuity issuer is not required to pay a structured settlement payment to someone other than the payee unless a court order with the required findings are made. Thus, if a creditor sought to garnish or levy on a payee’s right to structured settlement payments, it would be required to seek a court order stating that the transfer is in the best interests of the payee and the payee’s dependents. It is difficult to see how any creditor could establish this showing. Similarly, a trustee can never establish the statutory requirements to obtain the required court order to allow transfer of the payments, namely that the transfer is in the best interest of the payee and the payee’s dependents and thus structured settlement annuity payments are not part of the bankruptcy estate. Accordingly, Minn. Stat. § 549.31 changes the nature of structured settlement payments in Minnesota and removes structured settlement agreement and structured settlement payments from the bankruptcy estate.

7. 11 U.S.C. § 541(c)(2) provides that “A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.” The Group Annuity Certificate (Seaver Aff. Ex B) provides that “To the extent allowed by law, annuity benefits will be free from the claims of all creditors.” Whether the structured settlement constitutes a spendthrift trust is an issue of state law. See, e.g., *Jacobs v. Shields*, 116 B.R. 134, 136 (Bankr. D. Minn. 1990) (stating whether pension fund qualified as a spendthrift trust was analyzed under the applicable state law).

8. *In re Mack*, 269 B.R. 392 (Bankr. D. Minn. 2001) stated that federal courts have concluded that Minnesota state courts would not recognize a spendthrift trust if the trust was self settled. However, restrictions on transfers pursuant to Minn. Stat. § 549.31 and anti-assignment clauses contained in self settled structured settlement agreements and structured settlement payment rights are now valid and enforceable under Minnesota law.

9. In *Settlement Capital Corp.*, the structured settlement was self settled. *Settlement Capital Corp.*, 646 N.W.2d at 553-54. In *Settlement Capital Corp.*, the Minnesota Court of Appeals rejected the argument that Minn. Stat. § 549.31 only applies to structured settlements that contained an anti-assignment clause. Instead, the court found that Minn. Stat. § 549.31 applied to structured settlements that contain anti-assignment clauses as well as those that did not. By this finding, as applied to the self settled trust at issue in that case, the court implicitly acknowledged that *self settled* structured settlements that contain anti-assignment clause are valid under Minnesota law in light of Minn. Stat. § 549.31. Minn. Stat. § 549.31, by its terms, creates a new

statutory form of property interest for self settled structured settlements, one which is essentially a form of a spendthrift trust because transfer of the payee's interest is not permitted absent a court finding that the transfer would be in the payee and the payee's dependents best interest.

10. Given the plain language of Minn. Stat. § 549.31 and the Minnesota Court of Appeals interpretation of Minn. Stat. § 549.31 in *Settlement Capital Corp.*, the structured settlement annuity payments are “a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.”

11. More than two years after the date the case was filed, Plaintiff moved to amend her complaint to add a new claim arising under 11 U.S.C. § 544. Service and filing of the Amended Complaint occurred more than two years after the bankruptcy case was commenced. Plaintiff's 11 U.S.C. § 544 claim raises new issues not included within the original complaint. Because Plaintiff's new claim was commenced after the two year statute of limitations set forth in Minn. Stat. § 546 expired, Plaintiff is not entitled to judgment on this count and judgment should be entered against Plaintiff.

12. Plaintiff's 11 U.S.C. § 544 claim fails as a matter of law because the plain language of Minn. Stat. § 549.31 has the effect of excluding the settlement annuity payments from the bankruptcy estate.

### **ORDER FOR JUDGMENT**

1. Because the Structure Settlement is not property of the bankruptcy estate, Plaintiff's Motion for Summary Judgment is DENIED and summary judgment is entered against Plaintiff and in favor of Defendant.

2. Because 11 U.S.C. § 544 claim was not commenced within the time limits proscribed by 11 U.S.C. § 546 and the structured settlement is not property of the bankruptcy estate in light of Minn. Stat. § 549.31, Plaintiff's Motion for Summary Judgment is DENIED and summary judgment is entered against Plaintiff and in favor of Defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

DATED: \_\_\_\_\_

\_\_\_\_\_  
Nancy C. Dreher  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Chapter 7 Case

Michael R. Russell and Kimberly A.  
Russell,

Bky No. 02-41020

Debtors.

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Terri A. Georgen, Trustee,

Adv. No. 04-4105

Plaintiff,

v.

**UNSWORN CERTIFICATE OF SERVICE**

Kimberly A. Russell,

Defendant.

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I, Lorie Klein, of the law firm of Moss & Barnett, City of Minneapolis, County of Hennepin, State of Minnesota, declare under the penalty of perjury that on October 21, 2004, I served copies of the attached

1. Response to Motion for Summary Judgment;
2. Memorandum of Law Opposing Plaintiff's Motion for Summary Judgment and Supporting Summary Judgment in Favor of Defendant; and
3. Certificate of Service.

by facsimile or U.S. Mail, as directed, to each entity named below at the facsimile number or address stated below for each entity:

**FACSIMILE AND U.S. MAIL**

Randall L. Seaver, Esq.  
Fuller, Seaver & Ramette, P.A.  
12400 Portland Avenue South, Suite 132  
Burnsville, Minnesota 55337-2572  
Facsimile: 952-890-0244

Executed on: October 21, 2004

Signed: /e/ Lorie Klein

Lorie Klein  
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